United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Nancy Gleason

Bankruptcy No. 01 B 14730 **Adversary No. 01 A 731**

Adversary Caption: Dowd & Dowd, Ltd. vs. Nancy Gleason

Date of Issuance: December 13, 2001

Judge: Ginsberg

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	
	)	Chapter 11
Nancy Gleason,	)	
	)	No. 01 B 14730
Debtor.	)	
	)	
	)	Honorable Robert E. Ginsberg
Dowd & Dowd, Ltd.,	)	
	)	
Plaintiff,	)	Adversary Proceeding
	)	
v.	)	No. 01 A 00731
	)	
Nancy Gleason,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on creditor Dowd & Dowd, Ltd. ("Dowd & Dowd") motion to dismiss the Debtor Nancy Gleason's Chapter 11 case under § 1112(b) of the Bankruptcy Code, 11 U.S.C. § 1112(b), and a status hearing on the adversary proceeding. For the reasons stated in the memorandum opinion and order, the motion of Dowd & Dowd is granted. The case is dismissed. The adversary proceeding is dismissed as being moot because the case is dismissed.

This Court has jurisdiction over this proceeding under 28 U.S.C. §1334(b) as a matter arising under § 1112(b) of the Bankruptcy Code, 11 U.S.C. § 1112(b). The matter is before this Court under Internal Operating Procedure 15(a) (formerly known as Local Rule 2.33) of the United States District Court for the Northern District of Illinois, automatically referring

bankruptcy cases and proceedings to this court for hearing and determination. This is a core proceeding under 28 U.S.C. §157(b)(2)(A).

An evidentiary hearing was held on December 12, 2001, at which Dowd & Dowd and the Debtor presented evidence. After Dowd & Dowd presented its evidence, the Debtor moved for judgment on partial findings. This Court denied the Debtor's motion in an oral ruling on December 12, 2001, because Dowd & Dowd made out a prima facie case that the Debtor's filing was in bad faith. The hearing continued at that time, and the Debtor presented her case. The Debtor was the only witness who testified. The Court found the Debtor to be an uncooperative witness, and her testimony was less than forthright. This Court finds it incredible that, the Debtor, an attorney making over $200,000.00 per year, does not know exactly what her income is. The Court also finds it hard to believe that the Debtor is not being billed by Bell, Boyd & Lloyd for legal representation in her state appellate court case; she has provided no documentation whatsoever with respect to her legal fees. This Court also finds it hard to believe that, as the Debtor testified, she could not live if 25% of her more than $200,000.00 per year salary were garnished; she has, again, provided absolutely no documentation to support this contention.

Dowd & Dowd argues that the Debtor's Chapter 11 case should be dismissed because it was filed in bad faith, as an attempt to stall proceedings in the state court case. The Debtor argues that the Chapter 11 petition was filed in good faith, and that halting the state court litigation was only one reason for her filing. The evidence does not support the Debtor's argument. Filing a bankruptcy petition to avoid posting a supersedeas bond in a state court appeal alone may or may not be bad faith on its own, the totality of the circumstances support a

finding of bad faith. Even if the Debtor was not motivated to file the instant bankruptcy case solely to halt the state court proceeding, a finding of bad faith is still warranted, because the reorganization effort is essentially a two party dispute between the Debtor and Dowd & Dowd, the Debtor lacks the cash and other assets to fund a plan, and the Debtor has not shown that there is a reasonable probability that a reorganization plan can be proposed and confirmed.

Therefore, this Court finds that the Debtor's bankruptcy petition was filed in bad faith, and, therefore, the Debtor's bankruptcy case is dismissed.

Under 11 U.S.C. § 1112(b), the bankruptcy court may dismiss a chapter 11 case if requested by a party in interest, after notice and a hearing, for cause. 11 U.S.C. § 1112(b). Here, Dowd & Dowd has requested the dismissal, and, as a judgment creditor of the Debtor, Dowd & Dowd is clearly a party in interest with standing to request dismissal of the bankruptcy case.

Lack of good faith in the filing of a Chapter 11 case constitutes cause for dismissal under § 1112(b). In re Alton Telegraph Printing Co., 14 B.R. 238, 238 (Bankr. S.D.Ill. 1981). Bad faith has been found where a Debtor filed bankruptcy solely to pursue an appeal in a state court without having to post a supersedeas bond. In re Karum Group, Inc., 66 B.R. 436, 438 (Bankr. W.D. Wash. 1986). In Karum, the court concluded that, in addition to using the filing as a litigation tactic, the debtor had little, if any, intent to reorganize when it filed bankruptcy. Id. Bad faith was also found where, among other things, a debtor had only one significant creditor, who became a creditor as a result of a state court judgment, and where the debtor filed bankruptcy to escape the requirement of posting a supersedeas bond. In re Chu, 253 B.R. 92, 95 (Bankr. S.D. Cal. 2000).

Filing a Chapter 11 case to avoid posting a supersedeas bond does not always warrant a finding of bad faith. For example, in the Alton Telegraph case, the Chapter 11 filing was found to be made in good faith because the debtor had an ongoing and viable business, employed a substantial number of people, and had filed a plan of reorganization. Alton Telegraph, 14 B.R. at 241. The court in In re Ford also made a finding of good faith where the debtor filed a plan of reorganization in which he offered to pay his creditors in full after an orderly liquidation of his assets. In re Ford, 74 B.R. 934, 938 (Bankr. S.D. Ala. 1987). There, the debtor had assets which could be liquidated over time to pay his debts, and the Chapter 11 petition was filed to give the debtor time to liquidate his assets, and not solely to avoid posting a supersedeas bond. Id. at 938.

After Dowd & Dowd established a lack of good faith as a basis for dismissing the Debtor's Chapter 11 case, the burden of proving that the filing was made in good faith shifted to the Debtor. In re Fox, 232 B.R. 229, 233 (Bankr. D. Kan. 1999). Good faith on the part of the debtor is required to file and maintain a Chapter 11 case. In re HBA East, Inc., 87 B.R. 248, 258 (Bankr. E.D.N.Y. 1988). The good faith requirement operates to ensure that debtors seeking bankruptcy reorganization protection do so for no purpose other than to accomplish the legitimate aims and objectives of the Bankruptcy Code. Id. The Bankruptcy Code does not define "good faith," however, an analysis of good faith under § 1112(b) centers on the underlying inquiry of whether reorganization is the proper course of action in a particular case. In re McCormick Road Assoc., 127 B.R. 410, 413 (N.D. Ill. 1991). Good faith is determined on a case by case basis, after considering the totality of the circumstance in which the bankruptcy petition was filed. Id. Case law has set forth guidelines for determining whether a bankruptcy petition was filed in bad faith, which require the Court to examine: 1) whether the debtor filed

the Chapter 11 petition as a tactic to obtain a litigation advantage; 2) whether the Debtor's reorganization effort is essentially a two party dispute; 3) the nature and extent of the debtor's assets, debts and business operations; and 4) whether there is a reasonable probability that a reorganization plan can be proposed and confirmed. HBA East, 87 B.R. at 259.

Where the petition is filed under such circumstances as to make it clear that the primary, if not the only purpose of the filing was as a litigation tactic, the petition may be dismissed as being filed in bad faith. Id. Good faith is also lacking where the case involves little more than a dispute between two parties, such as where the other debts were not so significant or pressing as to necessitate the bankruptcy filing. Id. at 260. Additionally, because reorganization requires the existence of money or assets to pay business expenses and to fund a plan of reorganization plan, lack of cash and assets is indicative of a lack of good faith. Id. at 261. To prove that the bankruptcy petition was filed in good faith, a debtor must show that her chances of reorganizing are at least reasonably likely. McCormick, 127 B.R. at 416. Finally, filing a Chapter 11 petition to obtain a "breathing spell" does not warrant a finding of good faith. The protection of the automatic stay is not a justification for a Chapter 11 filing; it is a benefit that results from a filing that is otherwise done in good faith. HBA East, 87 B.R. at 262.

Based upon the evidence presented by Dowd & Dowd at the evidentiary hearing, the Debtor in this case filed the Chapter 11 petition solely to avoid posting a supersedeas bond. While she is employed as an attorney, she does not have employees and, more importantly, she has not filed a plan of reorganization, and according to the evidence presented, it is not clear when or if she ever will. The Debtor testified that she does not intend to file a plan until she finds out what happens with the appeal in state court. These facts support a finding of bad faith.

It was then up to the Debtor to prove that she filed the Chapter 11 petition in good faith. See, e.g., In re Namer, 141 B.R. 603, 607 (Bankr. E.D. La. 1992). The Debtor testified that she is still exploring her options and has not yet formulated a plan of reorganization. She testified that it was one of her strategies when filing the Chapter 11 petition to wait for the state court appeal to be decided before filing a plan, if a plan would be feasible. She did not testify as to what her other strategies were. She also testified that she thinks that she will have assets to fund a plan, as long as she does not incur further legal fees in litigation with Dowd & Dowd. Although she testified that she does not know exactly what her income is at this time, she estimated that it is approximately $200,000.00 per year. Her testimony as to the precise amount was evasive at best. She also testified that she could not survive if Dowd & Dowd garnished 25% of her wages. The Debtor stated that she needed "breathing room" so that she could continue working as an attorney. Finally, the Debtor testified that one of her other unsecured creditors, the law firm Bell, Boyd & Lloyd, to whom she owes money for legal representation, is currently representing her in the state court appeal, and has not been billing her for the current representation.

The Debtor has presented no evidence of good faith in the filing of her Chapter 11 petition. She provided no documentation to support a finding of good faith, and her testimony does not support such a finding. The Debtor's own testimony supports a finding of bad faith. One of her primary purposes of filing the petition was to avoid posting a supersedeas bond in the appellate case. This is primarily a dispute between two parties, the Debtor and Dowd & Dowd, as there was no evidence presented that any of the Debtor's other unsecured creditors are pressing her for payment, and, in fact, one of her unsecured creditors is currently representing her

in the appeal without billing her for that representation. The Debtor is not clear how much income she has and has few assets, and has testified that she could not survive if 25% of her wages are garnished. She also testified that she thinks she will be able to fund a plan if she does not have to pay legal fees. This does not show a reasonable likelihood of reorganization as required for a finding of good faith; in fact, it shows that it is unlikely that the Debtor would ever be able to fund a plan, or, at best, that she could possibly fund a plan if she incurs no further legal fees and if the plan calls for payments of less than 25% of the unknown amount of her income. This Court gives no weight to the argument that the Debtor's delay in filing a plan is evidence of bad faith; the Debtor's time to file a plan was extended by this Court to February 25, 2002. However, because the Debtor has not shown that her chances of reorganizing are reasonably likely, a finding of bad faith is still warranted here, even though the Debtor still has time to file a plan.

Based upon the testimony presented, this Court finds that the Debtor's bankruptcy filing lacked good faith and therefore her Chapter 11 case is dismissed.

Conclusion

For the reasons set forth in the memorandum opinion and order, the motion of Dowd & Dowd is granted. Case dismissed. The complaint is dismissed as being moot because the bankruptcy case has been dismissed.

ENTERED:

Dated: December 13, 2001

Robert E. Ginsberg
United States Bankruptcy Judge